

No. 5.

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JAMES H. MCKENNEY  
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Brief of Earle for Appts.

Filed Oct. 12, 1897.

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Supreme Court of the United States

OCTOBER TERM, 1896.

No. 47. 5.

THE PUEBLOS OF ZIA, SANTA AÑA, AND JEMEZ,  
*Appellants,*

vs.

THE UNITED STATES ET AL.

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Argument for Appellants.

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HENRY M. EARLE,  
*Attorney.*



# Supreme Court of the United States

OCTOBER TERM, 1896.

No. 41

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THE PUEBLOS OF ZIA, SANTA AÑA, AND JEMEZ,  
*Appellants,*

*vs.*

THE UNITED STATES ET AL.

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This claim for confirmation rests upon a grant made August 6, 1766, by Thomas Velez Cachupin, governor and captain-general of New Mexico, to the three pueblos of Zia, Santa Aña and Jemez. The *testimonio*, produced by the grantees, consists of a petition, order, report, granting decree, certificate of juridical possession and certificate by the governor that the same is a true copy of the original documents in the archives of the government. These papers are in words and figures following:

*His Excellency the Governor and Captain-General:*

I, Felipe Tafoya, lawyer of this town of Santa Fé, appear before your excellency in full legal form, for and in the name of Cristoval, Indian governor of the Pueblo of Zia, and Thomas, chief war captain of said pueblo, who come under appointment from their casique, and of the other inhabitants of their republic, and, sir, in the name of the aforementioned, and of the community of the Pueblos of Santa Aña and of Jemez, do state that they, from their foundation, have considered as their pasture ground, in the vicinity of their said pueblos, a valley commonly called the Holy Ghost Spring, and that in some urgent cases, the same as is known, is used as a pasture ground for the horses of this royal garrison, and the said parties being aware that the said valley has had, in its vicinity, some applicants to acquire the same by grant, which will cause them very great injury, as they have considerable cattle, sheep, goats and horses for the

royal service, and not having any other place in which to pasture them, particularly the people of the Pueblo of Zia, the greater part of whose fields are upland, and some of them in the glens of said valley, adjoining their said pueblo. In consideration of all of which, I ask and pray that your excellency, in the name of His Majesty (whom may God preserve), be pleased to declare said valley to be the legitimate pasture grounds and pastures of the pueblos, directing that the boundaries thereof be designated to them, that is, on the east, the pueblos aforesaid, on the west, the summits of the Puerco River, on the north, a place called the Ventana, where some Navajo Apaches reside, and on the south, the lands of the citizen settlers of said Puerco River, and, should your excellency order to be done as I have requested, the said parties, my clients, will receive grace with the justice which I ask, and declare in their name that this is not in dissimulation, and so forth.

FELIPE TAFOYA.

## DECREE.

TOWN OF SANTA FÉ, *June 16, 1766.*

Having seen the petition of the Republics of the three Pueblos of Zia, Santa Aña and Jemez, of the Queres nation, all contiguous to the banks of the Santa Aña River, I do, in order to decide in justice, commission the chief alcalde of said pueblos, Bartolomé Fernandez, to the end that, having examined the boundaries which they mentioned as of the Holy Ghost Spring, where they state they pasture their stock and horses, he reports to me the leagues the same may embrace from north to south and from east to west, and whether the aforesaid three pueblos have the cattle, sheep, goats and horses proportional to the boundaries asked for for their grazing, and also whether or not any citizen or citizens are damaged by said boundaries under any prior valid grant and possession held by them, which the said chief alcalde will perform with all possible veracity.

And I, Thomas Velez Cachupin, governor-general of this kingdom, have so provided, ordered and signed, with my two attending witnesses, in the absence of notaries, there being none in this government.

VELEZ CACHUPIN.

Witness : CARLOS FERNANDEZ.

Witness : JOSÉ MALDONADO.

## REPORT.

In compliance with the order of his excellency Thomas Velez Cachupin, governor and captain-general of this kingdom, in his foregoing decree of the sixteenth of June instant, I Bartolomé Fernandez, chief alcalde and war captain of the pueblos of the Queres, nation, proceeded to examine the lands asked for by the three Pueblos of Jemez, Zia and Santa Aña, and the boundaries which they mention in their petition, and I find that they contain, from north to south, that is, from the stone ford, which is the boundary of the citizen settlers of the Puerco River, to the Vintana, about eight leagues, somewhat more or less, and from east to west, that is, from the Pueblo of Zia, which is nearest to the lands asked for, to the Puerco River, about six leagues, somewhat more or less, in which distance I know of no lands suitable for cultivation, the watering places being scanty and few, and they are only suitable for pasturing live stock, which is abundant at said pueblos, though the said three republics have no other lands on which to sustain their stock, and it being, as it is true, that none of the aforementioned boundaries will injure any one holding or to hold possession of lands within the same, which proceedings I placed on record, signing the same with two attending witnesses, in the absence of notaries, there being none of any kind in this kingdom, town of Santa Fé, June, one thousand seven hundred and sixty-six.

BARTOLOMÉ FERNANDEZ.

Witness: JUAN MARIA ANTONIO RIVERA.

Witness: PEDRO PADILLA.

## GRANTING DECREE.

In the town of Santa Fé, on the sixth day of the month of August, one thousand seven hundred and sixty-six, I, Thomas Velez Cachupin, governor-general of this kingdom of New Mexico, in view of what is petitioned for by the three Pueblos of Santa Aña, Zia and Jemez, of the Queres nation, and of the report which their chief alcalde, Bartolomé Fernandez, makes,

that they have held said lands for their live stock, which at present is abundant, without having any other places in which to pasture them, except those referred to in their petition, together with the small watering places mentioned in said report, declared that I would grant, and I did grant, in the name of His Majesty (God preserve him), the aforesaid lands for pasturing the stock and horses of the aforesaid three Pueblos of Santa Aña, Zia and Jemez, with the boundaries, from north to south, from the place Ventana to the stone ford of the Puerco River, the boundaries also of the citizens of the place San Fernando of Nuestra Señora de la Luz; and from east to west, from the Pueblo of Zia to the said Puerco River, the eastern edge, the whole of the valley of the Holy Ghost Spring being embraced within the center and within the boundaries of this grant, with the condition and stipulation: that in case of necessity the horses of this royal garrison of Santa Fé may, and shall be, kept in said valley, the same being a place where they have been accustomed to graze; wherefore the aforementioned three pueblos are to place no obstacle in the way, nor claim damage therefor; and the aforementioned boundaries being for the future considered those of the aforementioned three pueblos, they will hold the same with legitimate title under this royal grant, so that they be not molested by any Spanish citizen or citizens, taking their stock thereupon, deeming the pasturage to be common. And I direct the chief alcalde, Bartolomé Fernandez, to go and give to the aforementioned three pueblos royal possession of this grant, and the boundaries therein set forth, taking with him the justices and seniors of each one of them, and placing his proceedings on record, following this my granting decree, which he will return to me, in order to furnish to each pueblo the proper testimonio of the whole, and deposit the original in the archives of this government, where it shall remain.

And I so provided, granted, ordered and signed, acting with two attending witnesses in the absence of notaries, there being none of any kind in this jurisdiction.

THOMAS VELEZ CACHUPIN.

Witness: CARLOS FERNANDEZ.

Witness: DOMINGO SABADIA.

## POSSESSION.

In compliance with the directions of his excellency Thomas Velez Cachupin, governor and captain-general of this kingdom of New Mexico, I, Bartolomé Fernandez, chief alcalde and war captain of the pueblos of the Queres nation, proceeded to the aforementioned pueblos, and, in company with the governors, casiques and other authorities of the Pueblos of Santa Aña, Zia and Jemez, proceeded to the lands asked for by the natives of the said three republics mentioned by his excellency the governor aforesaid, in the name of his majesty, as appears by the foregoing grant, and, summoning the contiguous land-holders, who are the residents of the place San Fernando, of the Puerco River, and the lieutenants, Juan Bautista Montaña, Agustin Gallego and Tomas Gurule, being present, I took by the hand the aforesaid governors, who are Cristoval Naspona, and Cristoval Chiguigui, Pedro Chite; Casiques Sebastian, Lazaro, Juan Antonio; War Captains Agustin, Tomas, Juan Domingo, and the other magistrates, and conducted them over said land, and they shouted long life to the king our sovereign, whom may God preserve, and they cast stones, and pulled up grass, in sign of possession, which I gave them, and which they received quietly and peaceably, without any opposition whatever, under the conditions mentioned in the aforesaid grant, and with the boundaries therein set forth, which are from north to south from the Ventana to the stone ford, and from east to west from the Pueblo of Zia to the eastern edge of the Puerco River. And that it may so appear, I, the aforesaid chief alcalde, signed this, with two attending witnesses, acting as special justice, in the absence of notaries, there being none in this jurisdiction, at this place, the Spring of the Holy Ghost, on the twenty-eighth day of September, in the year one thousand seven hundred and sixty-six. I certify.

BARTOLOMÉ FERNANDEZ.

Witness: MIGUEL TENORIO DE ALBA.

Witness: PEDRO GARCIA.

It agrees with the original on file in the archives of this government, from whence, I, Thomas Velez Cachupin, governor general of this kingdom of New Mexico,

ordered the same to be copied. It is true and corrected, and there were present my attending witnesses, with whom I act in the absence of notaries, there being none in this jurisdiction. In testimony of truth.

THOMAS VELEZ CACHUPIN.

Witness: CARLOS FERNANDEZ.

Witness: DOMINGO LABADIA.

The foregoing translation, made by me, is a correct rendering from the original in Spanish, to the best of my knowledge and belief.

SAM'L ELLISON.

Sworn to and subscribed before me this July 25, 1873.

JAMES K. PROUDFIT,  
*Surveyor General.*

SURVEYOR GENERAL'S OFFICE,  
TRANSLATOR'S DEPARTMENT, SANTA FÉ,  
NEW MEXICO, July 25, 1873.

The foregoing translation having been by me compared with its original in Spanish, and found correct, is hereby adopted as the official translation.

DAV. J. MILLER, *Translator.*

It appears from the record that the grant was presented to the surveyor-general of New Mexico under the provisions of the act of July 22, 1854, and, on February 2, 1873, by him approved and recommended to Congress for confirmation, which body has since taken no action upon it. November 28, 1892, the claim was filed in the Court of Private Land Claims under the provisions of the act of March 3, 1891.

The evidence shows (Record, p. 18, f. 31; 20, f. 32; 45, f. 74; 49, f. 80; 50, f. 82; 51, f. 83; 57, f. 91; 60, f. 96; 65, f. 103), that the grantees have possessed the tract to the present day.

On August 10, 1893, the petition was dismissed, the Land Court holding that the grant was a license to pasture, and not a grant in fee (R., 22, f. 35).

## A LICENSE TO PASTURE.

In the first place, it will be noted that this alleged license is in the usual form of a Spanish *grant in fee*—that is, it consists of a petition for the land, direction by the governor to the alcalde to make a report, the alcalde's report, granting decree and certificate of juridical possession. This same method of acquiring *title in fee* was followed by the republic of Mexico (see regulation of 1828), and in substance by the king himself in his royal grants (2 White, 189, 193, 196). The various steps are so familiar to the court that it is unnecessary to discuss the matter further.

The petition for the grant alleges that the Indians have considered it their pasture ground "from the time of their foundation (1689); that the reason they ask for a royal grant of it is because some settlers in that vicinity want to acquire the same by grant. The governor directs the alcalde to inquire into the facts, and to ascertain whether the "number of cattle, sheep, goats and horses of said pueblos is proportional to the boundaries asked for;" the alcalde finds that the pueblos have sufficient stock, and that their possession will injure no one. Thereupon the governor makes a grant of the *land* itself, and declares that the *boundaries* of the tract shall in the future be "considered those of the aforementioned three pueblos; they will hold the same with *legitimate title* under this *royal grant*." he directs the alcalde to give the pueblos "*royal possession of this grant*;" the alcalde proceeds, with the governors and casiques of the pueblos, to the *lands* asked for, summons the contiguous land owners, and places them in possession without injury to any third party.

This is precisely the course that would have been adopted if this alleged license had been a grant in fee.

On the face of the papers, then, there is nothing to indicate that this is a mere "license to pasture," unless it be the condition that the pueblos shall allow the horses of the garrison

at Santa Fé to graze thereon in case of necessity. This, however, did not convert the grant into a license any more than the royal cedula of December 12, 1748, converted every grant into a license because there was reserved the right to take therefrom a certain quantity of wood for the royal navy. The substance of this cedula was incorporated into article 9 of the regulations of Morales in these words (2 White, 211):

“Although the king renounces the possession of lands sold, distributed or conceded in his name, those to whom they are granted or sold ought to be apprised that his majesty reserves the right to take from the forests known here under the name of cypress woods all the wood which may be necessary for his use, and more especially which he may want for the navy.”

This right seems to have been taken from the king by the decree of the Cortes of January 14, 1812, but was restored by the cedula of September 18, 1814, wherein he says:

“With regard to timber growing on private lands no alteration be made for the present, saving always whatever his majesty may hereafter think fit to determine after fully examining that point.”

See 2 White, 142, 143, 247.

It could hardly be contended that a fee simple would be defeated by article 5 of the colonization law of August 18, 1824, on the ground that a certain right was reserved to the Mexican government in the lands granted by virtue thereof.

If, then, there is nothing on the face of the documents to indicate that they are not what they purport to be, namely, *a grant of land*, it must be that there is something inherent in the word “pasture” which compels the conclusion that this is a mere license.

Under the Spanish law, grants of land were made for two purposes, to wit, cultivation and grazing. This classification was followed by Mexico in its colonization law—that is to say,

a single person could acquire by grant one square league of arable land suitable for irrigation, four square leagues of arable land without the facilities of irrigation, and six square leagues of grazing land (1 White, 602). It has never been suggested that a grant of the latter was a mere license under this law.

In the case of *United States vs. Davenport* (15 How., 1, 7) the Supreme Court says:

"Under the laws and regulations of the Spanish crown it is a question of some doubt whether grants for the purpose of grazing cattle were any more than mere licenses to use the lands, and whether they were designed to operate upon the dominion. This question was presented in the case of *United States vs. Huertas*, 8 Pet., 475, upon a grant 'with the precise condition to use the lands for the purpose of raising cattle, without having the faculty of alienating said land by sale, transfer, control of retrocession or by any other title in favor of a stranger without the knowledge of this government,' was confirmed by decree of this court against that objection on the part of the government. We consider the question closed by the decision in that case in reference to the country formerly held by Spain lying east of the Sabine."

The grants in controversy in the above-mentioned case were for very large tracts of pasture land lying within what was known as the "neutral territory," and hence the reference by the court to the Sabine River. The *Huertas* cases (8 Pet., 475, 488) demonstrate the fact that, under the practice obtaining in Florida (which was different from that in New Mexico), at the end of four years from date of the first concession or warrant (which was generally issued by an under secretary) the governor gave the grantee a complete title if he had used the tract for pasturing his cattle during the time specified.

What gave rise to the doubt on this point was an alleged authority often quoted as "a communication from the governor of Florida to the king of Spain," and on the strength of

which grants have been disapproved by the surveyor-general under the act of July 22, 1854. This communication can be found in 2 White, p. 254, and is as follows :

"The concession of a great extent of land for the rearing and pasturing of cattle constitutes no more than the usufruct of it for the time agreed upon ; but the grantee has not, nor never had, the most remote right to solicit the proprietorship, for there is no law or regulation on which to found it, and consequently the land does not go out of the class of public lands, since it is the same as if it were held on rent."

A careful review of the whole matter will clearly show that this was simply the assertion of an attorney who was arguing the case of his client (the duke of Alagon) with the governor of Florida. The controversy was confined to pasture grants which had been abandoned, and even in these cases the governor says the grantees should be allowed to plead, to show whether they had been driven off by the Indians, etc., for on these "circumstances" it depends "whether they should or should not be adjudged to be out of the class of public lands" (2 White, 257). The governor took a view diametrically opposite to that of the attorney, as evidenced by the correspondence (*ib.*, 242-258).

That the Spanish government made grants of large tracts of land for pasturage in Texas can be seen by reference to the case of *Cavazos vs. Trevino* (6 Wall., 773), the grant being made in 1781 for 59 square leagues to a single individual.

The laws of Spain made no distinction as to acquiring title between lands for cultivation and lands for pasturage (2 White 35, *law* 9; *ib.* 36, *law* 7; *ib.* 37, *law* 14). *Liber* 4, *title* 2, *law* 1 (2 White, 38), expressly states what constitutes a *peonia* of land, to wit: A lot 50 feet front and 100 deep, 100 fanegas of arable land fit for the cultivation of wheat, 10 for corn, 2 huebras (as much land as a yoke of oxen can plow in two days) of garden land, and 8 for planting trees, with pasture sufficient for 10 breeding sows, 20 cows, 5 mares, 100 ewes,

and 20 goats. A *caballeria* was a tract five times as large. The same law provides that, that the settler may acquire a fee-simple after an occupancy of four years. Can it be said that he acquired title to the one class, but not to the other because it was for grazing purposes?

*Liber 4, title 12, law 13*, recognizes the general right of common of pasture in ungranted lands, and also the fact that a fee-simple may be acquired under a pasture grant, in the following language (2 White, 41):

"We command the viceroys to inquire concerning lands susceptible of irrigation, and to order the cattle to be withdrawn from the same, and they shall cause wheat to be sown on said lands, if the proprietors have not a *legal title to raise cattle thereon*."

*Liber 4, title 12, law 14*, provides for the distribution among the Indians—

"Whatever they may justly want to cultivate, sow, and *raise cattle, confirming to them what they may now hold*, and *granting what they may want beside*."

2 White, 41.

*Liber 4, title 12, law 5* (2 White, 39), providing for the distribution of lands and pastures among new settlers, declares that—

"The Indians shall be left in possession of their lands, hereditaments and *pastures*, in such manner that they shall not stand in need of the necessities of life, and shall be allowed all the aid and facilities for the sustenance of their household and families."

Article 2 of the regulation of 1754 (*ib.* 50) expressly provides that—

"In regard to lands of community and those granted the townships (*pueblos*) for *pasturage* and commons no

change shall be made; the towns shall be maintained in possession of them, \* \* \* and their extent enlarged according to the wants of the population,"

and a strict observance is enjoined by the same article of the requirements of *laws 14, 15, 17, 18 and 19, title 12, liber 4*, all of which, except *law 15*, relate to the lands of Indians.

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The defendants in this case set up an alleged grant made to Luis Maria Cabeza de Baca in 1815, but it will be noted that he abandoned the tract within two years (R. 28, f. 47), being, as his witnesses allege, driven off by the Navajos. Contrary to their usual custom, however, they gave him ample time to pack up his goods and quietly move (R. 28, f. 47), and the "Indians" did not allow him or his descendants to return until 1869. The Indians mentioned were undoubtedly the owners of the tract, namely, the inhabitants of Zia, Santa Aña and Jemez, and, as matter of fact, the same Baca was in 1819 petitioning for the land afterwards confirmed to the town of Las Vegas, in lieu of which five floats, covering 495,000 acres, were confirmed to his seventeen children and their descendants (act of June 21, 1860; 12 Stat., 72), whose names are set forth with such a flourish in the record.

In order to have any standing whatever before this court, the claimants under this alleged grant of 1815 must show a compliance with the law of Spain obtaining in such cases, which they have utterly failed to do. The royal cedula of 1571 provides as follows:

"We desire that the Indians may be in every respect relieved and well treated, and receive no molestation, damage or injury in their persons or property. And we command that, on all cases and occasions where it may be necessary to send or get information whether any injury would result to individuals by granting lands

to cultivate or distribute, or for other purposes, the viceroys, presidents and auditors will cause to be cited those really interested, and on the part of the Indians the fiscals of the royal audience, in order that all and each of the aforesaid may take his proceedings and allege his right against any injury that may result to his prejudice."

2 White, 79.

*Liber 4, title 12, law 16.* "In order to avoid the inconveniences and damages resulting from the sale or gift to Spaniards of caballerias or peonias, and other tracts of land, to the prejudice of the Indians, upon the suspicious testimony of witnesses, we order and command that all sales or gifts shall be made before the attorneys of our royal audiences, to be summoned for that purpose, who shall be bound to examine with due care and diligence the character and depositions of witnesses; and the presidents and audiences, where they shall administer the government, shall give or grant such lands by the advice of the board of treasury, where it shall appear that they belong to us, at auction, to the highest bidder, as other estates of ours, and always with an eye to the benefit of the Indians." *Ib.* 42.

*Liber 4, title 12, law 17.* "We command that the sale, grant and composition of lands be executed with such attention that the Indians shall be left in possession of the full amount of lands belonging to them, either singly or in communities, together with their rivers and waters." *Ib.* 43.

*Liber 4, title 12, law 9.* "We command that the farms and lands which may be granted to Spaniards, be so granted without prejudice to the Indians; and that such as have been granted to their prejudice and injury be restored to whoever they of right shall belong."

Since the discovery of the country by the Spaniards these Indians have been self-supporting, and have not caused the United States an outlay of one cent. On the contrary, they have often served as a barrier between its citizens and the in-

roads of the Apaches, Utes and Navajos. Spain threw its mantle of protection around them (Hall's Spanish and Mexican Law, sec. 154, *et seq.*).

We respectfully submit that this grant is perfect, and should be confirmed.

*Attorney for Appellants.*

## ASSIGNMENT OF ERRORS.

1st. Error in not holding that this grant is one that Mexico was bound to confirm and one that the United States should have confirmed under Section 13 of an Act of Congress approved March 3, 1891.

2nd. Error in not holding that Grantees had perfect title by prescription.

3rd. Error in holding that title was merely a license to pasture.

4th. Error in finding contrary to evidence.

5th. Error in not holding that title was perfect at date of change of flag.

6th. Error in not holding that grant was a perfect one under the laws of Spain in 1766.

7th. The Court erred in not confirming this grant in the name of Petitioners.